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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 802

ADDRIN COATES,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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ADDRIN COATES,
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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on October 7, 1966.

OPINION BELOW.

The opinion of the Court of Appeals (Appendix, infra) has not been reported as yet.

JURISDICTION.

The judgment of the Court of Appeals was entered on October 7, 1966 (Appendix, infra), the Petition for a Rehearing denied on October 27, 1966. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED.

Whether in a conspiracy count pleading in the conjunctive violations of Title 21, U. S. Code, 174, and Title 26, U. S. Code, 4705 (a) of the narcotic law, a jury is sufficiently instructed where the trial Court reads the indictment and the pertinent portions of the statutes to the jury, but fails to instruct specifically that it was necessary for the jury to find that the narcotic drug was imported contrary to law and that the defendant knew of such illegal importation, and whether by such omission the charge was so lacking in explanation as to be fundamentally erroneous under the Plain Error Rule of the Federal Rules of Criminal Procedure.

STATUTES INVOLVED.

26 U. S. C. 4705 (a) provides:

General requirement.—"It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate."

21 U. S. C. 174 provides:

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates

the transportation, concealment, or sale of any such narcotic durg after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned", according to law.

* * * * * * * *

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

18 U. S. C. Rule 52 B provides:

"Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court."

STATEMENT.

Petitioner was convicted by a jury in the United States District Court for the Eastern District of Missouri under a three count indictment which charged him, along with his co-defendant, Dennis Aggers, with the sale of narcotics on June 30, 1965, and with the sale of narcotics on July 22, 1965, and with a conspiracy to receive, conceal, buy and sell heroin, knowing the same to have been illegally imported in violation of 21 U. S. C. 174, and to sell such drug to persons not in pursuance of a written order on prescribed form, in violation of 26 U. S. C. 4705 (a). Defendant Coates was found not guilty on Count I and guilty on Count III (conspiracy). The jury disagreed on Count II.

Bernice Taylor, a drug addict with a previous narcotic conviction (R. 21-22), entered into a narcotic purchase

arrangement with the defendants, Coates and Aggers, under the surveilance of narcotic agents. Mrs. Taylor testified that under the plan she would call Aggers and advise him of the amount of narcotics desired.

Aggers would then call at her apartment and collect the purchase price. Subsequently, defendant Coates would telephone Mrs. Taylor and advise that the narcotics had been placed in a public telephone booth at a specified location (R. 24-26).

On June 30, 1965, Aggers came to Taylor's apartment, collected $200.00 for the sale of heroin (R. 26-30), and a short time thereafter defendant Coates telephoned Bernice Taylor to pick up the heroin in a public telephone booth (R. 30-31).

On July 14, 1965, Taylor advised Aggers she wanted to purchase $400.00 of heroin. Defendant Coates telephoned that he would get it for her (R. 33-34). On July 22, 1966, Aggers came to Taylor's apartment, collected the $400.00, and a short time later, Coates telephoned her to pick up the heroin in another public telephone booth (R. 35-37).

All meetings between Aggers and Taylor in Mrs. Taylor's apartment and all telephone calls between the parties were monitored by Narcotic Agent Patch (R. 27-28 and R. 77-81).

After receiving these phone calls informing where the narcotics had been concealed, Mrs. Taylor and Agent Patch went to such places and took possession of the packages found there (R. 71 and 83).

The packages contained heroin as identified by a Government chemist (R. 117 and 120).

Each defendant took the witness stand in his own defense and denied any part in the alleged sales or any

part in connection with the conspiracy (R. 129-130 and 139-140).

At the close of the trial, defendant Coates did not raise the issue here under consideration either by exception to the instruction given or by request for instructions.

The Court below affirmed the conviction of the conspiracy count finding no errors or defects in the instructions affecting appellant's substantial rights within the meaning of the Plain Error Rule.

REASONS FOR GRANTING THE WRIT.

In a prosecution for receiving and concealing heroin, knowing it to have been unlawfully imported, the essential elements are: (1) receipt, concealment, or sale of heroin by the defendant; (2) unlawful importation of the heroin by someone; and (3) the defendant's knowledge of such unlawful importation. Harris v. U. S., 359 U. S. 19, 23, 79 S. Ct. 560.

In a criminal case, the defendant is entitled to have the jury instructed on all the elements that must be proved to establish the crime charged. U. S. v. Gilliam, 288 F. 2nd 796; Apex Distributing Co. v. U. S., 368 U. S. 821, 82 S. Ct. 38; Kelley v. U. S., 107 U. S. App. D. C. 122, 275 F. 2nd 10.

In the present case the trial court did not make it clear in his charge in relation to the conspiracy that it was necessary for the jury to find elements number two and three above, dealing with illegal importation and knowledge thereof. The Court simply read the pertinent portions of the statutes to the jury and the indictment in the case (R. 191-197), and defined the terms "conspiracy", "knowledge" and "unlawfully", in their general terms but without focus on "knowledge of the unlawful importation" aspect of the conspiracy that brings it within

the Federal jurisdiction (R. 197 and 202-211). The trial judge failed to instruct specifically that knowledge of illegal importation was a necessary element of the conspiracy. It did not explain or amplify this element to the extent necessary to enable the jury to apply the law of the facts.

The question is whether instructions which fail to instruct, specifically, that the defendant must have knowledge of the illegal importation, can rest on the necessary inclusion of that element by reason of a general definition of "knowingly", coupled with a reading of the indictment and the pertinent section of the Code.

U. S. v. Massiah, 307 F. 2nd 62, holds that an omission to charge that knowledge of illegal importation was a necessary element of the conspiracy to violate the narcotic law, was plain error requiring reversal. Hernandez v. U. S., 300 F. 2nd 114, 121, mentions that this element of "knowledge of illegal importation" required to make out a conspiracy violative of 21 U. S. C., Section 174, was the element essential to Federal jurisdiction.

If we are going to require that defendant make a request for amplification of this essential element before explicit instructions are given on this, and without such request the Court need not affirmatively instruct the jury on this element of knowledge, then the purported requirement that "in a criminal case, a Court should instruct on all essential questions of law involved in the case, whether requested or not", Kreiner v. U. S., 11 F. 2nd 722, 731 and Morris v. U. S., 156 F. 2nd 525, 527, would have no real substance. We would in effect be relieving the Court of this burden and thrusting this responsibility of clarifying the issues on the defendant.

In this connection it is difficult to accept the position that "the instructions considered as a whole" reflect that knowledge of unlawful importation is a necessary element

of conspiracy to violate section 174. Actually, it is far more probable that the mere reading of the phrase in the indictment and in the code "knowing the same to have been imported or brought into the United States contrary to law", without an affirmative instruction on this element of knowledge, tended to minimize its importance. This is so especially here where there was no direct evidence in the record in regard to illegal transportation. The jury was far more likely to suppose that the defendant, as a local narcotic offender, was not at all concerned with the primary source of the drug and would have no knowledge whatsoever as to its unlawful importation. Consequently, the Court's failure to make such an element specifically applicable to the charge at hand, would be interpreted by the jury as a deliberate one abrogating such requirement of proof as mere surplusage.

While it is true that no exception was taken to the trial Court's charge in this conviction and that normally the Court would under these circumstances not take note of the error under Rule 30, Federal Rules of Criminal Procedure, there are, nevertheless, exceptions to this rule where the error is so fundamental as not to submit to the jury an element of the offense. Screws v. U. S., 325 U. S. 91, 107, 65 S. Ct. 1031; U. S. v. Levy, 153 F. 2nd 995, 998-99, and Rule 52B of the Federal Rules of Criminal Procedure:

"Plain Error. Plain errors or defects affecting substantial rights may be noticed, although they are not brought to the attention of the Court."

Here we are dealing with a fundamental omission affecting substantial rights under the above rule. Section 174 of 21 U. S. Code, requires a finding of unlawful importation and defendant's knowledge thereof as elements essential to Federal jurisdiction. Hernandez v. U. S., supra. And the question whether a specific finding of

such elements are necessarily included in a jury charge by reason of the reading of the phrase from the indictment and code "knowing the same to be imported or brought into the United States contrary to law in violation of Title 21, U. S. C. 174 (R. 192 and 194), is a question of vital importance in the enforcement of the narcotic laws and in the administration of the rule which requires a Court to instruct on all essential questions of law involved in the trial of a particular criminal case.

CONCLUSION.

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX.

United States Court of Appeals
For the Eighth Circuit.

No. 18,301.

Dennis Aggers, Appellant,

v.

United States of America, Appellee.

No. 18,373.

Addrin Coates, Appellant,

v.

United States of America, Appellee.

Appeals from the United States District Court for the Eastern District of Missouri.

[October 7, 1966.]

Before Vogel, Chief Judge, Van Oosterhout and Lay, Circuit Judges.

Van Oosterhout, Circuit Judge.

Defendants Aggers and Coates were jointly indicted, and tried to a jury on their not guilty pleas to a three count indictment against them. Counts 1 and 2 charge defendants illegally sold heroin on June 30, 1965, and July 22, 1965, respectively, in violation of 26 U. S. C., § 4705 (a). Count 3 charges them with conspiracy with each other and others to receive, conceal, buy and sell heroin knowing the same to have been illegally imported in violation of 21 U. S. C., § 174, and to sell such drug to

persons not in pursuance of a written order on prescribed form in violation of 26 U. S. C., § 4705 (a).

Defendant Aggers was found guilty on all three counts and was sentenced to serve ten years imprisonment on each count, such sentences to be served concurrently with each other but consecutively to sentence that Aggers was then serving on a state conviction.

Defendant Coates was found not guilty on Count 1 and guilty on Count 3 (conspiracy). The jury disagreed on Count 2. The court declared a mistrial as to such count. Coates was sentenced to serve eight years imprisonment on Count 3. Each of the defendants has filed a timely appeal from his aforesaid conviction and sentence.

The evidence follows a rather usual pattern in this type of case. Bernice Taylor, a drug addict with a previous narcotic conviction and with a recent narcotics violation charge against her which was dismissed on recommendation of narcotic agent Patch, and a self-confessed thief, was induced by agent Patch to enter into narcotic purchase arrangements with defendants under surveillance of narcotic agents. Mrs. Taylor testified that she had previously purchased narcotics from defendants on a number of occasions under a plan whereby she would call Aggers and advise him the amount of narcotics desired. Aggers would then call at her apartment and collect the purchase price and would then phone his wife to notify Larry that he had collected. Larry would then call Mrs. Taylor and advise that the narcotics had been placed in a public phone booth at a specified location. Agent Patch was in Mrs. Taylor's apartment when arrangements such as above described were made with respect to the charged sales. He was concealed in a bedroom and witnessed the payment to Aggers with government money that he had provided. He monitored the telephone conversations between Mrs. Taylor and Coates by means of an extension phone in the apartment. Patch and Mrs. Taylor identified

the Larry engaged in the telephone conversations as the defendant Coates, testifying that they were familiar with his voice. Aggers also testified that he had some acquaintance with Coates and that he called him Larry.

In each instance after receiving calls from Larry with regard to the location in which the heroin had been placed, Mrs. Taylor and Patch went to such place and Patch took possession of the package there found. The packages seized were properly traced into the hands of the government chemist who testified that each package contained heroin. Testimony corroborating various aspects of the foregoing evidence was provided by other government agents.

Each defendant took the witness stand in his own behalf and denied any part in the alleged sales or any part in connection with the conspiracy charged.

Defendants are represented by different counsel and raise distinct grounds for reversal, supported by separate briefs.

We have carefully considered the entire record. Viewing the evidence in the light most favorable to the government, as we must under established appellate review procedures, we have no doubt that the evidence is adequate to support the guilty verdicts returned by the jury. As disclosed by the discussion hereinafter dealing with the points separately raised by each defendant, we find that each defendant has had a fair trial and that no prejudicial error has been committed and that the judgments must be affirmed.

* * * * * * *

COATES APPEAL.

Coates asserts two errors upon his appeal. The first error is thus stated: "The evidence supporting the conviction of the conspiracy was the same evidence in the substantive Counts upon which the jury could not agree

on a verdict of guilty and therefore involved a determination adverse to the Government of the facts constituting the overt acts charged in the conspiracy."

Coates relies upon **Herman v. United States**, 5 Cir., 289 F. 2d 362, and **United States v. Marcone**, 2 Cir., 275 F. 2d 205. We find nothing in either case which compels a reversal here. In **Marcone**, defendant was acquitted on the substantive count and convicted of conspiracy. **Marcone** made the same contention here made by Aggers. The court rejected the contention, assigning two reasons. First, that the verdict on each of the counts was rendered at the same trial and hence his acquittal could have no res judicata aspects on the conviction count. Supporting authorities are cited. The second reason stated is that there was adequate evidence to establish a finding that a conspiracy existed and the acquittal on the substantive count did not constitute a finding adverse to the government that no overt act in furtherance of the conspiracy had been committed.

Herman lends some support to defendant's contention. We need not here determine whether such case was rightly decided. The basis of the decision appears to be that the jury acquittal on the conspiracy charge of all asserted co-conspirators invalidated defendant's conviction of conspiracy upon the ground that two or more persons are necessary for a conspiracy. The court recognizes "but where the acquittal of the substantive offense does not necessarily constitute a determination that the overt act was not committed the acquittal does not preclude a conviction on the conspiracy count." 289 F. 2d 362, 369.

In our present case, five overt acts are charged. The jury's conviction of co-conspirator Aggers on the two substantive counts as well as the conspiracy count would appear to establish that the jury found that the asserted overt acts of Aggers in receiving payment with respect to the two substantive counts sales was established. Addi-

tionally, we observe that no verdict and hence no acquittal exists as to Coates on Count 2.

Moreover, at least since the decision of **Dunn v. United States**, 284 U. S. 390, this court has consistently held that inconsistency of verdict upon separate counts of an indictment does not entitle the defendant to a reversal of a judgment upon the counts upon which he was convicted. **Coil v. United States**, 8 Cir., 343 F. 2d 573, 576; **Koolish v. United States**, 8 Cir., 340 F. 2d 513, 525-26; **Anderson v. United States**, 8 Cir., 262 F. 2d 764, 770; **Downing v. United States**, 8 Cir., 157 F. 2d 738, 739.

Finally, Coates urges that the court erred in failing to instruct the jury that knowledge of illegal transportation is a necessary element of the offense of conspiracy to violate the narcotics law. Defendant concedes that he did not raise the issue here under consideration either by exceptions to instructions given or by request for instructions. Rule 30, Fed. R. Crim. P., expressly provides: "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

The proper foundation for establishing a basis for questioning the applicable law as stated by the court in its instructions is by request for instruction or exceptions to instructions given. Absent such foundation, asserted errors in instruction are not entitled to consideration upon appeal absent a Rule 52 (b) plain error situation. **Singer v. United States**, 380 U. S. 24, 38; **Lopez v. United States**, 373 U. S. 427, 436; **Ramsey v. United States**, 8 Cir., 332 F. 2d 875, 877; **Franano v. United States**, 8 Cir., 310 F. 2d 533, 535.

Defendant relies largely upon the two to one decision in **United States v. Massiah**, 2 Cir., 307 F. 2d 62. The majority opinion in that case lends some support to de-

fendant's position upon the point here under consideration. The instructions of course differ from case to case. We do not have the **Massiah** instructions before us and it is unnecessary for us to pass upon the validity of such decision as applied to the facts of this case. We do observe, however, that we are impressed with the reasoning of the dissenting opinion of Chief Judge Lumbard supporting his view that absent request or exceptions, no prejudicial error existed in the instructions.

A careful consideration of the instructions given in this case as a whole leads us to the conclusion that no plain error was committed in the instructions. The conspiracy count pleads in the conjunctive, conspiracy to violate 21 U. S. C., § 174 and 26 U. S. C., § 4705 (a). Defendant's complaint is that the court did not make it clear that under § 174 a necessary element to sustain a conviction is knowledge that the drugs were illegally imported or else such possession as would under the terms of § 174 raise the presumption of such knowledge. Knowledge of illegal importation is without doubt an essential element of the § 174 offense but it is not an essential element of the § 4705 (a) offense.

In our present case, the court read the indictment which charges defendants "did wilfully, knowingly, unlawfully and feloniously conspire * * * to receive, conceal, buy, sell, * * * heroin * * * after being imported and brought into the United States, knowing the same to have been imported and brought into the United States contrary to law in violation of Title 21, United States Code, Section 174, * * *."

The court read to the jury § 174 including the words "knowing the same to have been imported or brought into the United States contrary to law." The court advised the jury that intent is an essential element in that "you must also believe the acts were knowingly and intentionally done by the defendant." "Knowingly" is defined

as follows: "'Knowingly' as used in these instructions means that state of mind wherein a defendant was in possession of facts from which he knew, or was aware that he could not legally do or fail to do the acts whereon he here stands charged."

Later, the court states: "Therefore, in order to find a defendant, or defendants, guilty, you must not only believe that they did the acts complained of, and of which they stand charged, but you must also believe that the acts were intentional and knowingly done by a defendant, or defendants."

We conclude that the instructions considered as a whole reflect that knowledge of unlawful importation is a necessary element of conspiracy to violate § 174. If more explicit instructions were desired, defendant should have made a proper request for amplification of the instructions as required by the rules of criminal procedure.

The judgments appealed from are affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

Crim.

Judgment.

United States Court of Appeals
For the Eighth Circuit.

No. 18373.

Addrin Coates,
Appellant,

vs.

United States of America.

Appeal from the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further ordered by this Court that the defendant in the said District Court do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of the filing of the mandate of this Court in the said District Court.

October 7, 1966.

Entered in accordance with opinion:

Robert C. Tucker,
Clerk, U. S. Court of Appeals
for the Eighth Circuit.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 802

ADDRIN COATES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was charged (counts 1 and 2) with selling heroin on two occasions without a prescribed order form in violation of 26 U.S.C. 4705(a), and (count 3) with conspiring with his co-defendant, Dennis Aggers, to (a) sell heroin, knowing it to have been illegally imported, in violation of 21 U.S.C. 174, and (b) sell the drugs not in pursuance of an authorized order form, in violation of 26 U.S.C. 4705(a). After a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted of the conspiracy, and acquitted on the first substantive count. The jury disagreed concerning the second substantive count and a mistrial was declared as to it. On February 4, 1966, petitioner

was sentenced to imprisonment for eight years.[1] The court of appeals affirmed (Pet. App. 9–16).

The evidence showed the following. After her arrest on a narcotics charge, Mrs. Beatrice Taylor agreed to assist in apprehending the individuals who supplied her with heroin (Tr. 87–88).[2] She called Aggers who said he would contact "Larry" (Tr. 28, 60–67). Aggers came to her home and received $200 (Tr. 29). Aggers then telephoned his wife, whom he told to "call Larry and tell him that I have the money and that everything is all right." (Tr. 30.) After Aggers left, Larry telephoned Mrs. Taylor and informed her that the narcotics would be found in a cigarette package on the floor of a telephone booth at a certain intersection in St. Louis (Tr. 30, 70). Federal Narcotics Agent Patch, who had monitored Mrs. Taylor's conversations with Larry (Tr. 67–70), retrieved the package containing heroin from the telephone booth at the specified location (Tr. 71, Government Exh. 4, 5). The next day when agent Patch spoke to petitioner at his place of employment, Patch recognized petitioner's voice as that of the "Larry" who had conversed with Mrs. Taylor on the telephone (Tr. 76).

On July 14, 1965, Mrs. Taylor made another request to Aggers for heroin (Tr. 33, 77). Shortly thereafter, Larry called to advise that he was temporarily out of heroin, but expected a large shipment soon (Tr. 77). On the afternoon of July 22, Mrs.

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[1] Co-defendant Aggers was convicted on all three counts and sentenced to concurrent ten year terms of imprisonment.

[2] The record of trial, filed with the Clerk of this Court, includes the one-volume transcript of trial ("Tr.").

Taylor telephoned Aggers, who followed the same routine as in the prior transaction. Again Aggers came to the apartment, where he was given $400, made a telephone call to his wife, and departed. In a short while, Larry telephoned Mrs. Taylor and informed her that the narcotics were in a package atop a telephone booth at a designated location, Moffitt and Belt Streets in St. Louis (Tr. 37, 80–81). Agents who had been maintaining a surveillance of petitioner observed him enter a telephone booth and dial the number of the telephone in the booth at Moffitt and Belt Streets (Tr. 105, 107–108). Petitioner was overheard saying, "You ready? Okay, I'll make the call now" (Tr. 106). He then placed another call and told the recipient, "The stuff is in a package over the door of a phone booth at Moffitt and Belt." Agent Patch retrieved the package of heroin from the telephone booth at that location (Tr. 81–86, Govt. Exhs. 9, 10).

Petitioner's sole claim is that the district court failed to instruct that knowledge of illegal importation was a necessary element of conspiracy to violate 21 U.S.C. 174. Petitioner concedes that he failed to raise this issue in the district court, or to request such an instruction, but asserts the failure was "plain error," Rule 52(b), Fed. R. Crim. P. This contention is without merit. Petitioner was charged with conspiring to violate both 21 U.S.C. 174 and 26 U.S.C. 4705(a). Knowledge of illegal importation is an element of the former but not the latter statute. Moreover, a reading of the instructions in their entirety shows that they fully and fairly presented all

of the issues. The district judge read the indictment and the underlying statute to the jury, including that portion of 21 U.S.C. 174 which indicated that the criminal offender must have imported the drugs "knowing the same to have been imported or brought into the United States contrary to law." (Tr. 192–196). Immediately following the instruction on the statute the court made several references to the term "knowingly" and defined the term. The court then summarized: "Therefore, in order to find a defendant, or defendants, guilty, you must not only believe that they did the acts complained of, and of which they stand charged, but you must also believe that the acts were intentional and knowingly done by a defendant, or defendants" (Tr. 197).

The instructions as a whole sufficiently outlined the issues to be determined by the jury. Lack of further emphasis on the element of knowledge that the drug was illegally imported does not amount to plain error requiring reversal in the absence of exception below,[3] see *United States* v. *Bentvena*, 319 F. 2d 916, 938–940 (C.A. 2), certiorari denied, 375 U.S. 940; *United States* v. *Agueci*, 310 F. 2d 817 (C.A. 2), certiorari denied, 372 U.S. 959, and *United States* v. *Goldstein*, 323 F. 2d 753, 754 (C.A. 2), certiorari de-

[3] *United States* v. *Massiah*, 307 F. 2d 62 (C.A. 2), relied upon by petitioner, is not to the contrary. In that case, the majority found plain error for failure to charge on knowledge of illegal importation, only in light of the trial court's error in instructing on the wrong conspiracy statute (18 U.S.C. 371), and in doing so with such inclusiveness of other elements as to suggest "to the jury that knowledge of importation was not necessary * * *," 307 F. 2d at 70.

nied, 376 U.S. 920, and does not present an issue warranting review by this Court.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966